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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

THE WOMEN'S STUDENT UNION,

*Plaintiff,*

v.

U.S. DEPARTMENT OF EDUCATION,

*Defendant.*

**PLAINTIFF'S OPPOSITION TO  
ORGANIZATIONAL MOVANTS' MOTION  
TO INTERVENE AS DEFENDANTS**

Civil Action No. 3:21-cv-01626-EMC

Judge: Honorable Edward M. Chen

Hearing: July 15, 2021, 1:30 PM (virtual)  
Courtroom 5, 17<sup>th</sup> Floor, 450 Golden Gate Ave.,  
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## INTRODUCTION

This case is about the Title IX regulations the U.S. Department of Education promulgated in 2020. The sole question presented is whether four components of those regulations (the “2020 Regulations”) complied with the Administrative Procedure Act (“APA”). The Foundation for Individual Rights in Education, Independent Women’s Law Center, and Speech First, Inc. (collectively “Movants”) seek to turn this suit into something far different: a fight over the constitutional bounds of sexual harassment law writ large, the results of which Movants hope will hamstring any future rulemaking the Defendant might pursue. Movants are free to develop litigation that will raise the momentous First Amendment question it wants answered. But this case does not. Because the scope of the Court’s inquiry here is circumscribed by the APA, the constitutional argument proffered by Movants can have no influence on the outcome of this suit. And Movants’ true objective—to thwart the Defendant from adopting an alternative definition of sexual harassment in the future—can be neither advanced nor frustrated by WSU’s case. As a result, Movants cannot uphold their burden to show an entitlement to mandatory or permissive intervention.

## ARGUMENT

## I. Movants Are Not Entitled To Intervene As Of Right

Under Federal Rule of Civil Procedure 24(a)(2), “a stranger to a lawsuit may intervene ‘of right’ where . . . letting the lawsuit proceed without that person could imperil some cognizable interest of his.” *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, 894 F.3d 1030, 1037 (9th Cir. 2018). That Rule is satisfied where (1) the motion is timely; (2) the would-be intervenor has “a ‘significantly protectable’ interest relating to the property or transaction which is the subject of the action;” (3) “the disposition of the action may as a practical matter impair or impede [the movant’s] ability to protect that interest;” and (4) the movant’s

1 “interest [is] inadequately represented by the parties to the action.” *Freedom from Religion Found.,*  
 2 *Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011). The movant “bears the burden of showing each  
 3 of the four elements is met,” and its “[f]ailure to satisfy any one of the requirements is fatal to the  
 4 application.” *Id.* Here, Movants are not entitled to mandatory intervention because they do not  
 5 satisfy three of these elements and cannot establish standing, a threshold requirement.<sup>1</sup>  
 6

7 **A. Movants Lack Standing**

8 The Ninth Circuit has held that Rule 24(a)’s requirement that an applicant seeking to  
 9 intervene as of right must have a significant protectable interest “implicitly” incorporates Article  
 10 III standing requirements. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 821 n.3 (9th  
 11 Cir. 2001); *SurvJustice Inc. v. DeVos*, No. 18-CV-00535-JSC, 2019 WL 1427447, at \*4 (N.D. Cal.  
 12 Mar. 29, 2019); *Pesticide Action Network N. Am. v. EPA*, No. C 08-01814 MHP, 2008 WL  
 13 11404954, at \*4 n.2 (N.D. Cal. July 8, 2008).

14 “To establish Article III standing, an injury must be concrete, particularized, and actual or  
 15 imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.” *Clapper*  
 16 *v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (internal quotation marks omitted). Where a  
 17 party’s standing rests on future harm, the “threatened injury must be *certainly impending* to  
 18 constitute injury in fact.” *Id.* “[A]llegations of *possible* future injury are not sufficient.” *Id.*  
 19 (internal quotation marks omitted); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)  
 20 (noting an alleged “threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or  
 21 ‘hypothetical’”). In addition, and crucially for this motion, where the party that must establish  
 22 standing is not “the object of the government action or inaction [it] challenges, standing is not  
 23 precluded, but it is ordinarily substantially more difficult to establish.” *Lujan v. Defs. of Wildlife*,  
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26  
 27 <sup>1</sup> WSU does not contest that Movants’ motion to intervene is timely.  
 28

1 504 U.S. 555, 562 (1992) (internal quotation marks omitted). Indeed, when, as here, the injury  
 2 “arises from the government’s allegedly unlawful regulation (or lack of regulation) of *someone*  
 3 *else*, much more is needed.” *Id.* That is especially so when the threatened injury is “contingent  
 4 upon the decisions of many independent actors in the causal chain.” *Missouri ex rel. Koster v.*  
 5 *Harris*, 847 F.3d 646, 654 (9th Cir. 2017) (citing *Clapper*, 568 U.S. at 413). Likewise, “it must be  
 6 ‘likely,’ as opposed to merely ‘speculative,’ that the inquiry will be ‘redressed by a favorable  
 7 decision.’” *Lujan*, 504 U.S. at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38,  
 8 43 (1976)).

9  
 10 Movants have failed to make these showings. Although with slight variations between  
 11 them, Movants FIRE and Speech First say the 2020 Regulations’ definition of “sexual harassment”  
 12 has allowed them to shift their resources to First Amendment cases that do not involve allegations  
 13 of sexual harassment, and that if WSU were successful in having the regulations set aside, they  
 14 would have to shift those resources back to their prior uses to First Amendment cases involving  
 15 allegations of sexual harassment. ECF 35-1 at 6.<sup>2</sup> But their own accounts make clear that shifting  
 16 of resources back would only arrive at the end of highly speculative “chain of possibilities,” each  
 17 dependent on third parties making certain discretionary decisions. *Clapper*, 658 U.S. at 410.  
 18

19  
 20 1. *Movants’ Fear That Universities Will Adopt Unconstitutional Policies If the*  
*2020 Regulations’ Definition of Sexual Harassment Is Set Aside Is Insufficient*  
*21 to Establish Standing*

22 Movants’ theory of standing flows from one legal premise—that the First Amendment bars  
 23 universities from prohibiting sexual harassment unless it is severe, pervasive, and objectively  
 24 offensive—and a number of factual premises: (1) before the 2020 Regulations were adopted, some  
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26  
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 28 <sup>2</sup> The five sentences describing the Independent Women’s Law Center, ECF 35-1 at 4, offer no  
 indication how it benefits from the 2020 Regulations and how setting aside the Regulations’  
 definition of “sexual harassment” would injure it. We thus do not address that movant further.

1 universities violated this First Amendment limitation in defining sexual harassment because they  
2 believed the Department would otherwise find them in violation of Title IX and Movants devoted  
3 some of their resources to opposing violations caused by those beliefs; (2) the 2020 Regulations’  
4 definition of sexual harassment “has reduced the frequency,” ECF 35-1 at 3, with which  
5 universities violate the First Amendment because the universities comply with the Regulations and  
6 the Regulations do not require universities to prohibit sexual harassment unless it is severe,  
7 pervasive and objectively offensive, thus permitting Movants to shift their resources elsewhere;  
8 and (3) if the 2020 Regulations’ definition of sexual harassment is set aside, universities will  
9 abandon that definition and return to a definition that violates the First Amendment, thus requiring  
10 Movants to shift their resources back.

12 The first two factual premises are only articulated in conclusory terms with no factual  
13 support. We question whether Movants would be able to proffer evidence supporting their causal  
14 claims that (1) it was the Department’s prior definition of “sexual harassment” that caused some  
15 universities to violate the First Amendment; and (2) it was the 2020 Regulations’ definition—  
16 which has been in effect for nine months, and which still permits schools to use broader  
17 definitions—that “has reduced the frequency with which universities attempt to punish free speech  
18 on sensitive issues of gender and sex,” ECF 35-1 at 3 (FIRE); *see id.* at 4 (“implementation of the  
19 rule has permitted FIRE and its student members to shift resources and efforts”), 5 (Speech First)  
20 (“If the Final Rule stands, schools will bring their policies in line with it, freeing Speech First to  
21 spend its resources on other pressing constitutional concerns.”). *See also* 34 C.F.R.  
22 § 106.45(b)(3)(i) (noting Title IX regulation does not foreclose schools from addressing sexual  
23 harassment that does not meet its new definition); 85 Fed. Reg. 30,026, 30,289 (May 19, 2020)  
24 (same).  
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1 Even if those claims could be established, Movants would still bear their burden of making  
2 plausible allegations (and later introducing evidence) that if the 2020 Regulations' definition of  
3 "sexual harassment" is set aside, then universities will make the decision to adopt a definition that  
4 violates the First Amendment (as understood by Movants) to align with earlier Department  
5 guidance. To the contrary, there are several significant legal reasons why such an allegation is  
6 implausible.  
7

8 First, a separate provision of the 2020 Regulations would prohibit universities from  
9 changing their definition of sexual harassment if, as Movants claim, the current definition is  
10 required by the First Amendment in higher education. The 2020 Regulations amended 34 C.F.R.  
11 § 106.6 to make clear that nothing in the regulations implementing Title IX requires an educational  
12 institution to "[r]estrict any rights that would otherwise be protected from government action by  
13 the First Amendment." 34 C.F.R. § 106.6(d)(1). While one could read this provision as a mere  
14 truism, FIRE told the Department in the comment it submitted during the rulemaking, which  
15 Movants link to in their memorandum, ECF 35-1 at 2, that the "plain declaration that Title IX  
16 enforcement will be conducted within a framework that recognizes the essentiality of  
17 constitutional rights" was "an important component of the proposed regulations." Foundation for  
18 Individual Rights in Education, Comment Letter on the Department of Education's Proposed  
19 Regulations on Title IX Enforcement at 5 (Jan. 30, 2019), <https://bit.ly/2Nl6qss>. FIRE explained  
20 that this provision was "helpful, and unfortunately necessary, in light of" university constitutional  
21 violations in adjudicating Title IX complaints. *Id.*; *see also* 85 Fed. Reg. at 30,419 (Department  
22 explaining that "§ 106.6(d)(1) acts as a saving clause to ensure that institutions do not violate the  
23 First Amendment's requirements"). Movants offer no grounds to believe this provision would not  
24 prove effective.  
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1       Further, the Department has taken other steps in the higher education arena “to promote  
 2 the First Amendment’s guarantees of free expression and academic freedom, as the courts have  
 3 construed them.” 85 Fed. Reg. 59,916, 59,916 (Sept. 23, 2020). Separate from its Title IX  
 4 regulations, the Department promulgated new regulations that provide that each “grantee that is [a  
 5 public] institution of higher education . . . must also comply with the First Amendment to the U.S.  
 6 Constitution . . . as a material condition of the Department’s grant.” 34 C.F.R. §§ 75.500(b)(1),  
 7 76.500(b)(1). A finding that a university violated the First Amendment, and thus a material  
 8 condition of its grant, would allow the Department to “impose special conditions aimed at  
 9 remedying noncompliance, temporarily withhold cash payments pending correction of the  
 10 institution’s deficiency, suspend or otherwise terminate a Federal award, or potentially disbar the  
 11 institution.” 85 Fed. Reg. at 59,924.

12       Consistent with those regulations, the Department has opened multiple investigations to  
 13 assess whether universities’ actions adhered to their public representations that they comply with  
 14 the First Amendment and indicated that fines might be assessed if the universities did not. *See*,  
 15 *e.g.*, 85 Fed. Reg. 61,732 (Sept. 30, 2020); Katherine Mangan, *3 Universities Face U.S. Inquiries*  
 16 *Into Free-Speech Controversies*, The Chron. of Higher Educ. (Oct. 1, 2020), <https://bit.ly/3cEq3Jr>.

17       Courts are “reluctant to endorse standing theories that require guesswork as to how  
 18 independent decisionmakers will exercise their judgment.” *Clapper*, 568 U.S. at 413. In the  
 19 absence of the 2020 Regulations’ definition of sexual harassment, *maybe* universities will decide  
 20 to implement unconstitutional definitions, and *maybe* Movants will need to shift resources to deal  
 21 with those decisions. But Movants can hardly claim any resultant injuries would be “certainly  
 22 impending or . . . fairly traceable” if the Court set aside the challenged definition of the 2020  
 23 Regulations. *Id.* at 414. To the contrary, Movants’ implication that some universities currently in  
 24 compliance with the 2020 Regulations’ definition of sexual harassment will return to their old,  
 25  
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1 allegedly unconstitutional, policies if the 2020 Regulations’ definition is set aside is speculative  
 2 and disregards the other legal tools the Department has deployed to require compliance with the  
 3 First Amendment. Thus, it is not “likely” that Movants will have to shift their resources to address  
 4 an increase in universities’ violations of the First Amendment (as Movants view it) if the  
 5 Regulations’ definition is set aside.  
 6

7 Finally, we note that the implausibility of Movants’ assertion—that universities will  
 8 change their definition of sexual harassment if the 2020 Regulations’ definition is set aside even  
 9 if, as Movants assert, such a change would violate the First Amendment—in no way suggests that  
 10 WSU would not benefit from the Court setting aside the 2020 Regulations’ definition of “sexual  
 11 harassment.” Movants are laser focused on the First Amendment in *higher education*—that is  
 12 where they devote their resources, where their student members are enrolled, and where the case  
 13 law they cite applies.<sup>3</sup> Movants do not allege, however, that the definition of “sexual harassment”  
 14 adopted in the 2020 Regulations embodies a constitutionally-required standard *when applied to*  
 15 *public elementary and secondary schools*. Nor could they. First Amendment rights of students in  
 16 public school environments are governed by the more forgiving standard laid out in *Tinker v. Des*  
 17 *Moines Independent Community School District*, 393 U.S. 503 (1969). Applying *Tinker*, the Ninth  
 18 Circuit held that a school district could suspend a seventh-grade student for participating in “sexual  
 19 harassment,” which was defined by the school to include “‘verbal . . . conduct of a sexual nature’  
 20 including ‘sex-oriented verbal kidding, teasing, or jokes.’” *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d  
 21 1142, 1148 (9th Cir. 2016). The Court concluded that schools “must have the authority to discipline  
 22 students for engaging in sexual inappropriate and harassing speech.” *Id.* at 1152. Thus, WSU  
 23  
 24

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25  
 26 <sup>3</sup> FIRE explained in its comment its “mission is exclusively to defend the rights of students and  
 27 faculty in the higher education setting” and thus it did “not address sections of the proposed  
 regulations that regulate K-12 schools.” FIRE Comment, *supra*, at 4 n.4.  
 28

would benefit from the Department enforcing Title IX's prior definition of sexual harassment against its school district even if that same definition could not be enforced against universities under the First Amendment, as Movants' claim.

## 2. *The Threatened Injury to Movants' Student Members Is Insufficient for Article III Standing*

Movants also claim that they have college student members who “have . . . been subjects of university disciplinary proceedings relating to alleged sexual harassment in the past.” ECF 35-1 at 4. But Movants do not explain or allege how the definition of “sexual harassment” was relevant to any particular member’s past disciplinary proceedings. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009) (holding that past injury could not suffice for standing where “it was not tied to application of the challenged regulations”). Even if they did plausibly allege that they were injured in the past by a university using a definition of sexual harassment that differs from the 2020 Regulations, such past injury cannot establish current standing. *See Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010) (noting that ordinarily “[p]ast exposure to harmful or illegal conduct” does not confer standing where the party does not seek retrospective relief). And Speech First’s allegation, not repeated by the other Movants, that its members “could be subject” to disciplinary proceedings by their colleges “in the future,” ECF 35-1 at 5, is far too tenuous to support standing. That threatened injury is not “clearly impending” or “fairly traceable” to the relevant part of the 2020 Regulations Movants seek to intervene to defend.

\* \* \*

For the above reasons, Movants lack Article III standing, and so cannot intervene by right in WSU's suit.

1                   **B. Movants Have Not Established a Protectable Interest Related to WSU's**  
 2                   **Claims**

3                   Even if Movants could establish Article III standing, they lack a "significant protectable  
 4                   interest" in the subject of this litigation, as is required for intervention as of right. *Geithner*, 644  
 5                   F.3d at 841. "An applicant seeking intervention is held to have a significant protectable interest in  
 6                   an action if (1) the applicant asserts an interest that is protected under some law, and (2) there is a  
 7                   relationship between the applicant's legally protected interest and the plaintiff's claims." *United*  
 8                   *States v. Sprint Comm., Inc.*, 855 F.3d 985, 991 (9th Cir. 2017) (internal quotation marks and  
 9                   alterations omitted). Here, Movants' three putative interests do not satisfy these conditions.

10                  First, Movants state that they are entitled to intervene "as a matter of right" in any "action  
 11                  challenging the legality of a measure [they have] supported" during the regulatory notice-and-  
 12                  comment process. ECF 35-1 at 6 (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392,  
 13                  1397 (9th Cir. 1995)). This misreads Ninth Circuit precedent. True, where a public interest group  
 14                  is "directly involved" in establishing a state statute or federal regulation, they may have a  
 15                  significant protectable interest in that statute or regulation. *Nw. Forest Res. Council v. Glickman*,  
 16                  82 F.3d 825, 837 (9th Cir. 1996), *as amended on denial of reh'g* (May 30, 1996); *see United States*  
 17                  *v. City of Los Angeles*, 288 F.3d 391, 402 n.5 (9th Cir. 2002) (stating that "special interest groups"  
 18                  may intervene in suits "challenging measures the organizations *helped to create*" (emphasis  
 19                  added)). But Movants submitted two of the over 124,000 public comments the Department  
 20                  received on its proposed Regulations prior to their promulgation in 2020. 85 Fed. Reg. at 30,044.  
 21                  Surely, not every one of these commenters is entitled to intervene as of right. Such a minimal  
 22                  degree of participation in an administrative proceeding falls well short of the "direct  
 23                  involve[ment]" courts in this Circuit have found to justify the intervention of public interest groups  
 24                  in the past. *See, e.g., Idaho Farm*, 58 F.3d at 1398 (conservation group permitted to intervene in  
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1 action to delist the Spring Snail as an endangered species where it had filed the suit that compelled  
 2 the agency to list the Spring Snail as endangered in the first place); *see also Nw. Forest Resource*  
 3 *Council*, 82 F.3d at 837-38 (collecting cases).

4 Nor can Movants simply rest on the fact that they are “public interest groups that advocate  
 5 for the free speech and due process rights the rule protects.” ECF 35-1 at 6. That the 2020  
 6 Regulations adopted a definition “of the type that [each group] supports and promotes” is  
 7 insufficient to establish a significantly protectable interest in the subject of this action. *Bates v.*  
 8 *Jones*, 127 F.3d 870, 874 (9th Cir. 1997) (denying intervention to a public interest group that  
 9 advocated for term limits in a case challenging term limits).<sup>4</sup>

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 11 *Second*, Movants do not have a legally protectable interest in allocating their resources any  
 12 particular way. A parties’ diversion of resources may be sufficient to show injury-in-fact for  
 13 purposes of standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 369 (1982). But injury-  
 14 in-fact is merely necessary, not sufficient, to establish a legally protectable interest required for  
 15 mandatory intervention under Rule 24. For example, it is not enough for an applicant to have an  
 16 economic interest in a suit; the economic interest must be protected by law. *See, e.g., Greene v.*  
 17 *United States*, 996 F.2d 973, 976 (9th Cir. 1993) (“An economic stake in the outcome of the  
 18 litigation, even if significant, is not enough.”); *Nikon Corp. v. ASM Lithography B.V.*, 222 F.R.D.  
 19 647, 650-51 (N.D. Cal. 2004) (holding movant’s economic interest in lawsuit was not protectable  
 20 absent legal entitlement); ECF 27 at 15-16 (collecting cases). Movants’ diversion-of-resources  
 21 theory, then, is not only highly speculative, *see supra* pages 4-8, but turns on a potential injury that  
 22 would not rise to the level of a “protectable interest” for purposes of intervention.

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 26 <sup>4</sup> To the extent Movants’ argument relies on their interest in members’ due process rights, those  
 27 are entirely disconnected from the claims at issue here, which do not concern challenges to the  
 28 2020 Regulations’ procedural provisions. *See generally* Compl., ECF 1.

1        *Third*, Movants cannot demonstrate the necessary non-speculative “relationship” between  
 2 free speech and due process rights of their members and the claims at issue here. *See United States*  
 3 *v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) (noting legally protectable interest must  
 4 be “non-speculative” and “related to the underlying subject matter of the action”); *Habeas Corpus*  
 5 *Res. Ctr. v. U.S. Dep’t of Just.*, 627 F. App’x 662, 663 (9th Cir. 2015) (denying intervention  
 6 because alleged interest was too speculative). As explained above, Movants have not plausibly  
 7 alleged that vacating the 2020 Regulations would actually threaten the constitutional rights of their  
 8 members. *See supra* pages 4-9.

10        **C.      The Defendant Adequately Represents Movants’ Interests**

11        To the extent that Movants have shown standing and a significant and legally protectable  
 12 interest in this litigation, they have not overcome the presumption that the Defendant will  
 13 adequately represent that interest. “Where [a] party and the proposed intervenor share the same  
 14 ultimate objective, a presumption of adequacy of representation applies.” *Geithner*, 644 F.3d at  
 15 841 (internal quotation marks omitted). And “[i]n the absence of a very compelling showing to the  
 16 contrary, it will be presumed that a [government] adequately represents its citizens when the  
 17 applicant shares the same interest.” *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003), *as*  
 18 *amended* (May 13, 2003) (internal quotation marks omitted). Crucially, strategic differences do  
 19 not amount to different ultimate objectives. *See United States v. City of Los Angeles*, 288 F.3d at  
 20 402-03 (“[D]ifferences in strategy . . . are not enough to justify intervention as a matter of right.”);  
 21 *Nw. Forest Res. Council*, 82 F.3d at 838 (same).

22        Here, Movants admit that the Defendant shares its objective of defending the 2020  
 23 Regulations, ECF 35-1 at 11, triggering a strong presumption of adequacy. Yet they contend that,  
 24 for two related reasons, the Defendant does not adequately represent their interests. Those  
 25 arguments are far from “very compelling.” *Arakaki*, 324 F.3d at 1086.

1                   1. *Movants' Desire to Add Constitutional Arguments Does Not Establish*  
 2                   *Inadequacy.*

3                   Movants argue that the Defendant does not adequately represent their interests because,  
 4                   although the government shares their “immediate interest in defending the rule,” the Defendant  
 5                   will not make their favored constitutional argument—an argument that, if successful, would  
 6                   foreclose the Department from adopting some alternative positions in the future. ECF 35-1 at 11.  
 7                   But these putative differences are not enough to defeat the presumption of adequate representation  
 8                   because Movants’ objectives only diverge from the Defendant’s with respect to matters outside  
 9                   the scope of this case. *New York v. U.S. Dep’t of Educ.*, No. 20-CV-4260 (JGK), 2020 WL  
 10                   3962110, at \*4 (S.D.N.Y. July 10, 2020) (denying Movants’ attempt to intervene in a different  
 11                   challenge to the Regulations because “[i]n the scope of issues presented in this case, the objectives  
 12                   of the [Movants] and [the Defendant] are aligned” (emphasis added)).

14                   i. *The 2020 Regulations May Not Be Defended on the Novel*  
 15                   *Constitutional Grounds Movants Advance*

16                   To start with the basics: WSU’s lawsuit is about the 2020 Regulations and the 2020  
 17                   Regulations alone. The sole question before the Court is whether four portions of those rules were  
 18                   adopted in compliance with the APA. WSU asserts that, in adopting its definition of sexual  
 19                   harassment, the Defendant failed to grapple with tradeoffs and provide reasoned explanations—  
 20                   procedures required by the APA. ECF 1 at 22-23, ¶¶ 85-89. WSU’s claim, then, does not call on  
 21                   the Court to identify the full set of definitions the Department could ever adopt. It only asks  
 22                   whether *this* one, promulgated in *this* way, is legal.<sup>5</sup>

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 26                   <sup>5</sup> WSU does not, as Movants claim, argue that Title IX and the APA “mandate” one particular  
 27                   “broadened definition of ‘sexual harassment.’” ECF 35-1 at 3. That is, WSU does not make a  
 28                   *Chevron* step one argument that, in passing Title IX, Congress expressed a clear view on what  
 definition of sexual harassment the Department should employ. *See, e.g., Chevron, U.S.A., Inc. v.*

1        “It is a ‘foundational principle of administrative law’ that judicial review of agency action  
 2 is limited to ‘the grounds that the agency invoked when it took the action.’” *Dep’t of Homeland*  
 3 *Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (quoting *Michigan v. EPA*, 576  
 4 U.S. 743, 758 (2015) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943))). As a result, the 2020  
 5 Regulations can only be defended based on a fixed universe of justifications already endorsed by  
 6 the Department. And Movants are clear that their constitutional argument is not one the  
 7 Department used to explain its adoption of the 2020 Regulations; after all, that is why Movants  
 8 are confident the Defendant will not advance its favored arguments. ECF 35-1 at 11. To the extent  
 9 Movants support the current definition of sexual harassment for a reason different than that given  
 10 by the Defendant, such reasoning cannot play into the outcome of this suit. Movants thus cannot  
 11 offer anything to this litigation beyond what the Defendant already provides. *See Nw. Forest Res.*  
 12 *Council*, 82 F.3d at 838 (evaluating advocacy based on whether applicants would “offer” anything  
 13 to the proceedings existing parties would “neglect”).<sup>6</sup>

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16        *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Bicycle Trails Council of Marin v.*  
 17 *Babbitt*, 82 F.3d 1445, 1452 (9th Cir. 1996), as amended (June 17, 1996).

18        For their part, although the Movants at times suggest the 2020 Regulations’ definition is  
 19 constitutionally required, their actual argument is a little different: They say that “any broader  
 20 definition of sexual harassment [than the one in the 2020 Regulations] would violate the First  
 21 Amendment” as applied to higher education. ECF 35-1 at 2. They never suggest that a narrower  
 22 definition would be unconstitutional. Like the Defendant, then, Movants also defend the 2020  
 23 Regulations’ definition of sexual harassment as one within a “range of constitutionally  
 24 permissible definitions,” *id.* —specifically, one at the outer bound of that range. Perhaps  
 25 Movants and the Defendant disagree about the precise contours of the universe of constitutional  
 26 definitions (though that is not apparent from Movants’ briefing). But both agree the 2020  
 27 Regulations adopted a definition of sexual harassment from within a set of constitutionally  
 28 permissible options.

6        Intervenors might be allowed to advance alternative justifications not relied on by the agency in one circumstance: *Chevron* step one arguments, in which they contend “Congress has directly spoken to the precise question at issue,” *Chevron*, 467 U.S. at 842, and so no analysis of the agency’s reasoning is necessary. *See Eagle Pharms., Inc. v. Azar*, 952 F.3d 323, 331 n.12 (D.C. Cir. 2020) (citing cases). For the reasons described above, the challenge to the 2020 Regulations’ definition of sexual harassment requires instead a step two inquiry. *See supra* page 13 n.5.

1           No wonder, then, that two courts have already denied Movants' intervention into APA  
 2 challenges to the 2020 Regulations on the grounds that their concerns about the constitutionality  
 3 of alternative definitions are outside the bounds of those cases. *Victim Rts. L. Ctr. v. Rosenfelt*, 988  
 4 F.3d 556, 562-63 (1st Cir. 2021); *New York*, No. 20-CV-4260 (JGK), 2020 WL 3962110, at \*3.  
 5 The Defendant's sound decision not to try to turn an APA challenge to an existing regulation into  
 6 a sweeping survey of all the hypothetical positions the Department can and cannot take going  
 7 forward would not render the government an inadequate representative. *Victim Rts. L. Ctr.*, 988  
 8 F.3d at 562-63; *New York*, No. 20-CV-4260 (JGK), 2020 WL 3962110, at \*4.

10           ii.     *Movants' Arguments Run Headlong Into Principles of*  
 11                   *Constitutional Avoidance*

12           As the First Circuit noted in denying Movants' intervention in a similar challenge, “[c]ourts  
 13 are obliged to avoid rulings on constitutional questions when non-constitutional grounds will  
 14 suffice to resolve an issue.” *Victim Rts. L. Ctr.*, 988 F.3d at 563; *see also Lyng v. Nw. Indian*  
 15 *Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) (“A fundamental and longstanding principle  
 16 of judicial restraint requires that courts avoid reaching constitutional questions in advance of the  
 17 necessity of deciding them.”). “The [M]ovants’ putative interest in having certain constitutional  
 18 issues addressed now rather than later,” the Court explained, “does not obviate the principle of  
 19 constitutional avoidance.” *Victim Rts. L. Ctr.*, 988 F.3d at 563; *see also New York*, No. 20-CV-  
 20 4260 (JGK), 2020 WL 3962110, at \*3 n.2 (explaining that constitutional avoidance advises against  
 21 Movants’ intervention in challenge to 2020 Regulations).

23           Such avoidance is particularly appropriate here because the constitutional questions are not  
 24 only unnecessary but unhelpful in resolving the case. Even if Movants were correct that the  
 25 Department’s previous sexual harassment definitions were unconstitutional, that would not resolve  
 26 the question of whether the Department’s adoption of *this* definition, from among the permissible

1 options, complied with the APA's procedural requirements. *See supra* page 13-14 & n.5. Movants'  
 2 constitutional concerns, then, are neither necessary nor sufficient to resolve this case.

3 Movants fail to distinguish their motion to intervene in this case from their unsuccessful  
 4 attempt to intervene in *Victim Rights Law Center v. Rosenfelt*, which the First Circuit rejected  
 5 largely on constitutional avoidance grounds. Cherry-picking language, Movants suggest that the  
 6 Ninth Circuit requires a lesser showing of inadequate government representation than does the  
 7 First. ECF 35-1 at 11-12. Not so. To be sure, the Ninth Circuit generally does not require an  
 8 applicant demonstrate inadequacy with "absolute certainty." *Citizens for Balanced Use v. Mont.*  
 9 *Wilderness Ass'n*, 647 F.3d 893, 900 (9th Cir. 2011). But neither does the First Circuit. *See, e.g.*,  
 10 *Victim Rts. L. Ctr.*, 988 F.3d at 561 ("Generally, an applicant for intervention need only make a  
 11 minimal showing that the representation afforded by existing parties likely will prove inadequate."  
 12 (internal quotation marks omitted)). And, like the First Circuit, the Ninth Circuit requires a "very  
 13 compelling showing" to overcome the presumption that the government will adequately represent  
 14 an applicant's interest. *Arakaki*, 324 F.3d at 1086; *see also* *Victim Rts. L. Ctr.*, 988 F.3d at 561  
 15 (requiring "a strong affirmative showing that the [government] is not fairly representing the  
 16 Movants' interests" (internal quotation marks omitted)). Indeed, Movants' intervention is even  
 17 less justified in this case than it was in *Victim Rights Law Center*. In the latter, plaintiffs challenge  
 18 the 2020 Regulations not only on APA grounds, but also as a violation of the equal protection  
 19 guarantee of the Fifth Amendment—a claim for which novel constitutional defenses might be  
 20 appropriate. *See* *Victim Rts. L. Ctr.*, 988 F.3d at 559, 560 n.1. Movants' arguments that their  
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1 constitutional arguments were permissible grounds to defend the rule, then, were stronger in the  
 2 First Circuit.<sup>7</sup>

3       2. *Movants' Different Motivations for Defending the Rule Do Not Establish*  
 4 *Inadequacy*

5       Movants also argue that the Defendant is an inadequate representative because the  
 6 government cares about both protecting free speech and stopping sexual harassment, and Movants  
 7 are concerned only with the former. ECF 35-1 at 9. But this purported difference in motivations  
 8 does not, on its own, establish inadequacy. After all, government actors will always have unique  
 9 institutional concerns about how to balance different constituencies' needs and priorities. Yet they  
 10 are specially presumed to serve as adequate representatives for those who share their ultimate goals  
 11 in the litigation. *See supra* pages 11-12; *see also Prete v. Bradbury*, 438 F.3d 949, 957 (9th Cir.  
 12 2006) (rejecting proposed reason to find inadequate representation that would apply to  
 13 governments in general, and so “eliminate the presumption of adequate representation when the  
 14 government and the intervenor-applicant share the same interest”). Movants’ “purely speculative”  
 15 notion that the Defendant’s interest, while presently aligned with Movants’, may “at some other  
 16 unspecified time in the future[] diverge” in the event of a future rulemaking does not justify  
 17 intervention. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1307 (9th Cir. 1997).

18       In assessing adequacy of representation, courts look not to parties’ and Movants’  
 19 motivations broadly, but to their goals within the litigation. *See Perry v. Proposition 8 Off.*

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 23       <sup>7</sup> In trying to distinguish *Victim Rights Law Center*, Movants also suggest, in passing, that the  
 24 Ninth Circuit has rejected the First Circuit’s logic in explaining that adequacy should not be  
 25 “defin[ed] . . . in terms of what existing parties are going to argue,” but instead “in terms of the  
 26 interests of the [Movants] in the subject matter of the litigation.” ECF 35-1 at 12 (quoting *United*  
 27 *States v. Oregon*, 839 F.2d 635, 638 (9th Cir. 1988)). But the core problem with Movants’  
 28 constitutional argument as a justification for intervention is not that the Defendant will not make it. It  
 is that the Defendant, and any intervenor, *could not* and *should not* make it. *See Victim Rts. L. Ctr*,  
 988 F.3d at 562-63; *supra* pages 13-14.

1 *Proponents*, 587 F.3d 947, 949 (9th Cir. 2009) (finding that movant effectively had “identical  
 2 interests” to existing parties where they shared an “ultimate bottom line”: “uphold[ing]”  
 3 challenged legislation); *see also Pennsylvania v. President U.S.*, 888 F.3d 52, 62 (3d Cir. 2018)  
 4 (permitting intervention based on mismatch between government and movant’s objectives within  
 5 the litigation). The Ninth Circuit’s decision in *Arakaki v. Cayetano* illustrates that principle. There,  
 6 a group of native Hawaiians (collectively “Hoohuli”) sought to intervene in a lawsuit challenging  
 7 the provision of benefits by Hawaiian state agencies. *Arakaki*, 324 F.3d at 1081. Undoubtedly, the  
 8 Hoohuli, as recipients of the benefits, had different motivations than the state defendants, the  
 9 providers of the benefits. But the Ninth Circuit concluded that, because the defendants shared the  
 10 goal of defending the state’s actions, and were ready and able to make all relevant arguments, they  
 11 adequately represented the Hoohuli. *Id.* at 1086-88.

13 Movants admit that both they and the Defendant seek to defend the 2020 Regulations. ECF  
 14 35-1 at 11 (noting the Department’s “immediate interest in defending the rule”). To the extent the  
 15 Movants pursue an additional objective—hamstringing future agency action—that is well outside  
 16 the scope of this case. *See supra* pages 12-14. And Movants do not explain how their exclusive  
 17 concern for free speech protection will, practically, lead to different strategic decisions given that  
 18 no party can defend the 2020 Regulations on grounds not advanced by the Department during its  
 19 rulemaking. *See supra* pages 12-14. That distinguishes this case from *Trbovich v. United Mine*  
 20 *Workers of America*, 404 U.S. 528 (1972), where the applicant urged additional grounds for the  
 21 court to reach the existing party’s shared objective, *id.* at 529-30, and also sought unique injunctive  
 22 relief beyond that requested by the plaintiff, *id.* at 530 & n.3. There, intervention could give rise  
 23 to different “approach[es] to the conduct of the litigation.” *Id.* at 539. But there is no way for  
 24 Movants’ preferred constitutional arguments to come into play as the Court adjudicates this APA  
 25 challenge, and thus no reason to find the Defendant’s existing representation inadequate.  
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1                   *Californians for Safe and Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d  
 2 1184 (9th Cir. 1998), is similarly inapposite. There, a union-intervenor provided specific reasons  
 3 to think the mismatch between the scope of its interest and the state defendants' would result—  
 4 and indeed already had resulted—in meaningfully different litigation positions that rendered the  
 5 existing parties' representation inadequate. Br. for Appellee, *Californians for Safe & Competitive*  
 6 *Dump Truck Transp.*, 1997 WL 33551014 at \*41 (9th Cir. Oct. 6, 1997). Because the only  
 7 additional “point of view” Movants bring falls outside the scope of this litigation, they fail to  
 8 overcome the presumption of adequate representation.

10                  **D.      Movants’ Interests Will Not Be Impaired in the Absence of Intervention**

11                  Movants are also not entitled to mandatory intervention because they will have many other  
 12 opportunities to protect their asserted interests. *See, e.g., Alisal*, 370 F.3d at 918 (holding that  
 13 applicant had protectable interest but could protect that interest through separate avenues); *United*  
 14 *States v. City of Los Angeles*, 288 F.3d at 402 (same). Most obviously, if the Department initiates  
 15 rulemaking related to the challenged provisions, Movants will be able to make their views known  
 16 in the notice and comment period. 5 U.S.C. § 553(c). They can, in that forum, share their view that  
 17 any definition of sexual harassment broader than the one the Department adopted in the 2020  
 18 Regulations would run afoul of the Constitution. *See* ECF 35-1 at 2. If the Department nonetheless  
 19 adopted a view contrary to Movants’ policy preferences, the organizations could file their own  
 20 APA or constitutional challenge, so long as they can establish standing. 5 U.S.C. § 706. Movants  
 21 may also collaterally attack the Defendant’s future actions by suing a university, should one take  
 22 disciplinary action against a student in a manner Movants believe is unconstitutional and  
 23 compelled by the Defendant. *See New York*, No. 20-CV-4260 (JGK), 2020 WL 3962110, at \*3  
 24 (explaining alternative avenues by which Movants could advance their argument about the alleged  
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unconstitutionality of Defendant's former policies). In short, if Movants wish to challenge future action the Department might take, they will have plenty of chances to do so. But not here.

Movants are wrong to suggest the “potential stare decisis effects” of the Court’s ruling will impair their ability to stop the Department from adopting a different definition of sexual harassment in the future. ECF 35-1 at 7-8. As explained above, the Court is not called, in this case, to judge any sexual harassment definitions other than the one contained in the 2020 Regulations. *See supra* pages 13-14. The Court’s decision, then, will in no way foreclose Movants from arguing, in the future, that any broader definition the Department might adopt is unconstitutional. *New York*, No. 20-CV-4260 (JGK), 2020 WL 3962110, at \*3 (“Because the issue of what rules the Constitution requires is not an issue the Court needs to reach to resolve the claims in the Complaint . . . the movant’s interest will not be ‘adversely affected . . . by principles of stare decisis, arising out of the final judgment to be entered in this case.’”). To be sure, Movants might like for the Court to proclaim unnecessarily on the alleged unconstitutionality of other potential definitions, and so provide dicta useful for potential future litigation over potential future agency action. But their interests will not be impaired, in either the colloquial or technical sense of the word, if the Court does not do so—a far cry from the sort of injury-by-precedent that can justify intervention. *See Greene*, 996 F.2d at 977 (finding that *stare decisis* concerns only come into play where the “precedential impact” will “clear[ly]” and “directly” affect “subsequent relief sought by the [applicant]”); *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007) (noting state’s interest in protecting its lands and resultant proceeds might be impeded if a precedential opinion established a right of action to challenge the use of those proceeds).

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For the above reasons, Movants are not entitled to intervention as of right.

1           **II. The Court Should Deny Movants Permissive Intervention**

2           Movants also fail to meet the requirements for permissive intervention. Under Federal Rule  
 3 of Civil Procedure 24(b)(1)(B), a court may exercise discretion to grant permissive intervention to  
 4 an applicant that “shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3)  
 5 the applicant’s claim or defense, and the main action, have a question of law or a question of fact  
 6 in common.” *Perry*, 587 F.3d at 955. Even if an applicant meets the threshold jurisdictional,  
 7 timeliness, and commonality requirements, a district court nonetheless retains broad discretion to  
 8 deny permissive intervention. *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). In  
 9 exercising that discretion, courts “must consider whether the intervention will unduly delay or  
 10 prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3). The Court may  
 11 also consider factors—sometimes known as “*Spangler* factors” after an influential case—  
 12 including “the nature and extent of the intervenors’ interest, their standing to raise relevant legal  
 13 issues, the legal position they seek to advance, and its probable relation to the merits of the case  
 14 . . . , [and] whether the intervenors’ interests are adequately represented by other parties.” *Spangler*  
 15 *v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

16           **A. Movants’ Alleged Interests are Too Speculative and Attenuated from WSU’s  
 17           Claims**

18           As with mandatory intervention, permissive intervention is not appropriate where, as here,  
 19 the movant’s interests are “nonexistent, contingent on future events, or tangential to th[e]  
 20 proceeding.” *Mishewal Wappo Tribe of Alexander Valley v. Salazar*, No. 5:09-CV-02502 EJD,  
 21 2012 WL 4717814, at \*6 (N.D. Cal. Sept. 28, 2012), *aff’d*, 534 F. App’x 665 (9th Cir. 2013). In  
 22 such a circumstance, the applicant’s defense and the main action lack a common question of law  
 23 or fact—a threshold requirement for permissive intervention. *See id.*; *see also Med. Advocates for*  
 24 *Healthy Air v. EPA*, No. CV 11-3515 SI, 2011 WL 4834464, at \*5 (N.D. Cal. Oct. 12, 2011)  
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1 (holding applicant failed to make threshold showing for permissive intervention because its alleged  
 2 interests were speculative and too attenuated from plaintiff's case). The discretionary *Spangler*  
 3 factors also weigh against granting intervention when a movant's interests are so speculative and  
 4 attenuated from the plaintiff's action. *See Spangler*, 552 F.2d at 1329 (noting court may consider  
 5 "the nature and extent of the intervenors' interest" and their positions' "probable relation to the  
 6 merits of the case").

8 As described above, Movants' alleged interests in this litigation are highly speculative with  
 9 no established connection to WSU's claims. *Supra* pages 3-9. Movants clearly like the 2020  
 10 Regulations and would prefer the Department not deviate from those in the future. But they have  
 11 not established that WSU's success would affect them in any concrete, non-speculative way. As  
 12 such, Movants cannot establish the requisite common question of law or fact related to the specific  
 13 claims at issue in this case, and the *Spangler* factors discourage permissive intervention as well.  
 14

15 **B. Movants Have Not Overcome the Presumption that the Defendant Will  
 16 Represent its Interests**

17 As with intervention as of right, "the adequacy of representation alone is a sufficient ground  
 18 to deny permissive intervention." *Carroll v. Wells Fargo & Co.*, No. 15-CV-02321-EMC, 2016  
 19 WL 3951650, at \*1 (N.D. Cal. July 22, 2016) (Chen, J.); *see also Spangler*, 552 F.2d at 1329  
 20 (noting court may consider "whether the intervenors' interests are adequately represented by other  
 21 parties"). For the reasons explained above, Movants have failed to overcome the presumptions that  
 22 the Defendant will adequately represent their putative interests. *See supra* pages 11-19.

23 **C. Movants' Intervention Will Cause Undue Delay and Prejudice**

24 Just as important here is a concern that uniquely dominates consideration of permissive  
 25 intervention: potential "undu[e] delay or prejudice [of] the adjudication of the original parties'  
 26 rights." Fed. R. Civ. P. 24(b)(3). Intervention will cause such an effect if it will insert into the case  
 27  
 28

“extraneous legal and factual issues that [the plaintiff’s] lawsuit would not otherwise invoke.” *Apple Inc. v. Iancu*, No. 5:20-CV-06128-EJD, 2021 WL 411157, at \*5 (N.D. Cal. Feb. 5, 2021) (quoting *UMG Recordings, Inc. v. Bertelsmann AG*, 222 F.R.D. 408, 414 (N.D. Cal. 2004)). “Such allegations would divert time and resources from the principal thrust of [the plaintiff’s] lawsuit and entangle the legal and factual issues involved therein within a web that is not of the original parties’ making.” *Id.*; *see also Sierra Club v. EPA*, No. 13-CV-2809-YGR, 2013 WL 5568253, at \*5 (N.D. Cal. Oct. 9, 2013) (denying permissive intervention because applicant’s claims were “not at issue in th[e] litigation” and “opening the door to . . . additional contentions would only serve to confuse the matters at issue in the complaint”).

Movants’ intervention would have exactly this effect. As discussed above, Movants seek intervention to make arguments that are well outside the scope of WSU’s suit. *See supra* pages 12-14. These arguments cannot, as a matter of administrative law, influence the Court’s adjudication of this APA challenge one way or the other. *See supra* pages 13-14. Movants’ participation would thus serve as a pure distraction, furthering neither the Court’s ability to adjudicate this case nor Movants’ purported interests in this litigation. *See Perry*, 587 F.3d at 956 (weighing the “value added” by an applicant in assessing permissive intervention). For that reason, the Court should deny permissive intervention. *Cf. Apple Inc.*, No. 5:20-CV-06128-EJD, 2021 WL 411157, at \*6 (denying permissive intervention because it “[ran] the risk of transforming th[e] case from one assessing . . . a single discretionary agency rule to one evaluating an effort to compel rulemaking”).

### III. If the Court Grants Some Form of Intervention, It Should Limit Movants to Defending the Existing Definition of Sexual Harassment

For the reasons explained above, the Court should not grant Movants either mandatory or permissive intervention. If the Court nonetheless decides to do so, it should grant Movants intervention only with respect to the definition of sexual harassment—the one part of WSU’s claim

1 that Movants address in their briefing. (Movants mention, in passing, arguments they would like  
 2 to make about what disciplinary procedures the Constitution requires, ECF 35-1 at 11, but WSU  
 3 does not challenge any of the 2020 Regulations' procedural requirements.) Movants have not  
 4 attempted to provide any reasoning as to why they should be permitted to intervene to defend the  
 5 three other challenged portions of the 2020 Regulations. As a result, they should not be allowed to  
 6 do so.

8 **CONCLUSION**

9 For the above reasons, WSU respectfully asks the Court to deny Movants' motion to  
 10 intervene.

11 Date: June 14, 2021

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on June 14, 2021, a true and accurate copy of the foregoing was electronically filed with the Clerk of Court using the Court's CM/ECF system, which will send a notification of the filing to counsel in this case.

/s/ Lauren A. Khouri